IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 11 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)
Versus
GASKETS & RADIATORS DISTRIBUTORS - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
SERVED BY RPAD - (N) for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 12/09/2006

CAV

(Per : HONOURABLE MR.JUSTICE M.R. SHAH)

Mr. M.R. Bhatt, learned counsel for the Revenue. None for the assessee though served.

2. The Income Tax Appellate Tribunal, Ahmedabad Bench, 'A' has referred the following question to this Court for opinion arising out of I.T.A. No. 4487/Ahd/1992 with respect to Assessment Year 1986-87, at the instance of the Revenue;

> *"Whether on the facts and circumstances of the case and in law, the Income-tax Appellate Tribunal was right in allowing the assessee's claim regarding deduction under section 80HHC by holding that the receipts such as interest, export incentive, octroi refund and sales in India should form part of the total profits to work out the total turn-over and qualifying profit ?"*

3. The facts in nutshell are as under;

The assessee claimed deduction under Section 80HHC of Rs. 1,13,060/-considering the receipts like interest income, export incentive, sales excluding such receipts arrived at a business loss of Rs. 2,02,398/-. The Assessing Officer was of the opinion that the aforesaid sum was assessable under the head “other sources” and was not income from business activity and therefore he did not accept the assessee's plea to include the said amount in the total turnover to be computed under Section 80HHC. Being aggrieved and dissatisfied with the order passed by the Commissioner of Income Tax (Appeals), the Revenue preferred an appeal before the Income Tax Appellate Tribunal and the Tribunal, concurring with the order passed by the C.I.T. (A), dismissed the appeal. The Tribunal also further allowed the cross-objections submitted by the assessee in the aforesaid appeal and held that the claim of the assessee for deduction under Section 80HHC be reworked. However, at the

instance of the Revenue, the aforesaid question is referred to this Court for opinion.

4. The assessee firm was engaged in exporting engineering goods to Mombasa, Dar-Es. Salaam, Tanzania and Nigeria. Purchases of Rs. 3,35,482/- were made for various parts in India and export sales of Rs. 4,21,172 were made. On scrutiny of the Profit and Loss account of the firm it was noticed by the Assessing Officer that the assessee firm had credited the following amount in profit and loss account;

1.	Interest received	Rs.1,09,965/-
2.	Export refund	Rs.1,36,312/-
3.	Octroi refund	Rs. 28/-
4.	Sales-tax refund	Rs. 32,053/-
5.	Dividend from Industrial Corpn.	Rs. 8,144/-
6.	Provision on Bonus written off.	Rs. 2,832/-
7.	Sales in India	Rs. 17,817/-
	Total	Rs.3,07,157/-

The assessee claimed relief under Section 80HHC of the Income Tax Act with respect to the interest received, export incentive, octroi refund, and sales in India. The Assessing Officer disallowed the claim of the assessee under Section 80HHC of the Act by holding that the aforesaid income cannot be considered as business income. Therefore, the short question, which is required to be considered by this Court is whether the income of interest on deposits, amount of export incentive, octroi refund, and sales in India are forming part of the total profits to work out the total turnover and qualifying profit and the aforesaid receipts are required to be considered for deduction under Section 80HHC of the Act.

5. Shri Manish Bhatt, learned counsel appearing on behalf of the Revenue, has submitted that receipts such as interest, export incentive,

octroi refund etc.,cannot be considered to be an income out of business so as to claim deduction under Section 80HHC of the Act. He has relied upon the decision of the Hon'ble Supreme Court in the case of ***Pandian Chemicals Ltd. vs. Commissioner of Income-Tax, [2003] Vol. 262 ITR 278*** in support of his submission that the interest earned on deposit cannot be considered to be a 'business income'. Relying upon the aforesaid decision, he has submitted that any receipt of amount so as to attract Section 80HH of the Income Tax Act must be understood as some thing which has a direct or immediate nexus with the assessee's industrial undertaking. It is submitted that the business of the assessee was exporting engineering goods and therefore income from the interest on deposit cannot be considered to be a business income. Shri Bhatt has also relied upon another decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income-Tax vs. Sterling Foods, [1999] Vol.237 ITR***

Page 579 in support of his above submission and with regard to his submission that export incentive cannot be considered to be 'business income'. He has also relied upon the decision of the Kerala High Court in the case of ***G.T.N. Textiles Ltd., vs. Deputy Commissioner of Income-Tax (Assessment) And Another, [2005] 279 ITR 72 (Ker)*** as well as the decision of the Allahabad High Court in the case of ***Commissioner of Income Tax vs. Himalaya Cutlery Works, (2006) 201 CTR (All) 167*** in support of his above submissions.

6. So far as 'income derived from sales in India' is concerned, he has relied upon sub-section (1) of Section 80HHC and has submitted that only in a case where an assessee being an Indian Company or a person resident in India who is engaged in the business of export out of India of any goods or merchandise, the provisions of Section 80HHC would be applicable and only that assessee can claim a deduction under Section

80HHC. It is submitted that the assessee Company was not an Indian Company and therefore they could not have claimed the deduction under Section 80HHC of the Income Tax Act. The sum and substance of the submissions on behalf of the learned counsel appearing for the Revenue is that any income derived by interest on deposit, the benefit of export incentive, amount received by way of octroi refund cannot be considered to be a business income and that the assessee would not be entitled to deduction of sales in India under Section 80HHC of the Act.

7. Identical question came to be considered by the Hon'ble Supreme Court in ***Pandian Chemicals Ltd. vs. Commissioner of Income-Tax,*** *[supra]* and the question, which was posed for consideration before the Apex Court was whether the interest on deposits with Tamil Nadu Electricity Board should be treated as income derived by the industrial undertaking for the purpose of Section

80HH or not, and the Hon'ble Supreme Court has observed that Section 80HH of the Income Tax Act grants deduction in respect of profits and gains “derived from” an industrial undertaking and the words “derived from” in Section 80HH of Income Tax Act, 1961 must be understood as something which has a direct or immediate nexus with the assessee's industrial undertaking. The Supreme Court held that interest derived by the industrial undertaking of the assessee on deposits made with the Electricity Board for the supply of electricity for running the industrial undertaking could not be said to flow directly from the industrial undertaking itself and was not profits or gains derived by the undertaking for the purpose of the said deduction under Section 80HH. In ***G.T.N. Textiles Ltd., vs. Deputy Commissioner of Income-Tax (Assessment) And Another,*** *[supra],* the Kerala High Court held that interest on Bank deposits was not profit derived from export of goods. The Kerala High Court has

further held that the interest earned by the assessee on fixed deposits, commission received on sale of machinery, etc., were not business income and consequently the assessee was not entitled to computation of eligible deduction under Section 80HHC of the Act by including those receipts under business income. Therefore, considering the aforesaid two decisions, we must hold that the Tribunal as well as the Commissioner of Income Tax (Appeals), both committed an error in treating the interest on deposits as 'business income' and granting the assessee the deduction under Section 80HHC of the Act.

8. In ***Commissioner of Income-Tax vs. Sterling Foods,*** *[supra]*, the assessee was engaged in processing prawns and other sea food, which it exported, and it also earned some import entitlements granted by the Central Government under an Export Promotion Scheme. The assessee

claimed the deduction of such receipt under Section 80HH of the I.T. Act by contending that the said income of import entitlements be treated as a business income. The Supreme Court held as under;

> *".....The source of import entitlements could not be said to be the industrial undertaking of the assessee. The source of the import entitlements could only be said to be the Export Promotion Scheme of the Central Government whereunder the export entitlements became available. There must be, for the application of the words "derived from", a direct nexus between the profits and gains and the industrial undertaking. In the instant case, the nexus was not direct but only incidental. The industrial undertaking exported processed sea foods. By reason of such export, the Export Promotion Scheme applied.*

> *Thereunder, the assessee was entitled to import entitlements, which it could sell. The sale consideration therefrom could not be held to constitute a profit and gain derived from the assessee's industrial undertaking. The receipts from the sale of import entitlements could not be included in the income of the assessee for the purpose of computing the relief under section 80HH of the Income-tax Act, 1961".*

In ***Commissioner of Income Tax vs. Himalaya Cutlery Works,*** *[supra]*, the question before the Allahabad High Court was whether the incentives received by the assessee are part of export turnover and therefore entitled to relief under Section 80HHC or not, and the Allahabad High Court has held that, amount received as duty drawback, cash incentive and on transfer of import licence do not form part of export turnover and, therefore, not entitled to relief

under Sec. 80HHC. Considering the aforesaid two decisions, one of the Apex Court and another of Allahabad High Court, we hold that the Tribunal as well as the C.I.T. (A) has committed an error in holding export incentive and octroi refund as business income and eligible for deduction under Section 80HHC of the I.T. Act.

9. So far as the amount received by the assessee for sales in India, and the claim of the assessee for that amount under Section 80HHC of the Income Tax Act is concerned, it is required to be noted that for claiming deduction under Section 80HHC of the Income Tax Act only an assessee being an Indian Company or a person resident in India can claim the benefit/deduction under Section 80HHC. Admittedly, the assessee, in the present case, is not an 'Indian Company'. Under the circumstances, for the sales in India by the assessee and the income earned by the assessee for sales in India, the assessee would

not be entitled to deduction under Section 80HHC of the Act. Under the circumstances, the Tribunal committed an error in holding that the income from sales in India by the assessee are forming part of the total profits to work out the total turnover and qualifying profit. Therefore the assessee would not be entitled to the deduction under Section 80HHC of the I.T. Act for the income earned by it by sales in India.

10. Thus, considering the aforesaid decisions and Section 80HHC of the Income Tax Act, the Tribunal as well as the C.I.T. (Appeals) both have committed an error in treating the income of interest on deposits, export incentive, octroi refund and sales in India to be part of the total profits to work out total turnover and qualifying profit and treating the same as business income, and the Income Tax Appellate Tribunal was not right in allowing the assessee's claim regarding rebate under Section 80HHC of the

Act by holding that the receipts such as interest on deposits, export incentive, octroi refund, and sales in India would form part of the total profits and to work out the total turnover and qualifying profits.

11. For the reasons aforesaid, the Reference is answered in favour of the Revenue and against the assessee. The Reference is accordingly disposed of.

[R.S. Garg, J.]

[M.R. Shah, J.]

RMR.